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IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

CITIZENS' SAVINGS AND TRUST COMPANY,
Appellant,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, BELLEVILLE AND SOUTHERN ILLINOIS RAILROAD COMPANY, AND ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,
Appellees.

No. 238.

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

BRIEF FOR APPELLANT.

EDWARD C. ELIOT,
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Counsel.

THOS. A. P. FLEMING PRINTING CO., ST. LOUIS

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Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

STATEMENT OF FACTS.

This is a direct appeal under the terms of the Act of Congress of March 3, 1891, from a decision of the Circuit Court of the United States for the Eastern District of Illinois, dismissing complainant's bill for want of jurisdiction.

As the merits of complainant's bill are not now in issue, it will only be necessary to set out so much thereof as will apprise this Honorable Court of the general theory on which the bill was drafted and the relief it seeks. It is a minority stockholders' bill brought by the Citizens' Savings and Trust Company, a citizen of Ohio, against the Illinois Central Railroad Company, the Belleville & Southern Illinois Railroad Company, the St. Louis, Alton & Terre Haute Railroad Company, citizens of the State of Illinois, and the United States Trust Company of New York, a citizen of the State of New York. The last named corporation was joined as a mere formal party, being the trustee under certain deeds of trust, for the purpose of enabling said corporation to intervene and plead if it so desired.

Under the allegations of the bill the following principal facts appear:

The Belleville & Southern Illinois Railroad Company was organized under an Act of the General Assembly of the State of Illinois, dated February 14, 1857, and another Act dated March 4, 1869, both being public laws of said State. Under the powers granted to it in its charter the Belleville Company constructed and put in operation a line of railway from Belleville, in St. Clair County, in the State of Illinois, to Du Quoin, in the County of Perry, in said State, both of which points are within the Eastern District of the State of Illinois, as will be judicially noticed.

On October 1st, 1866, a gross earnings lease for a period of nine hundred and ninety-nine years was executed by and between the Belleville Company as party of the first part, and the Terre Haute Company as party of the second part, under which lease the railroad of the Belleville Company was operated by the Terre Haute Company until the year 1895. In the year 1895 a new lease was executed between the Belleville Company, the Terre Haute Company and the Illinois Central Railroad Company, under which lease the

properties of the said Belleville Company, previously held by said Terre Haute Company as lessee, were transferred to the Illinois Central Railroad Company for a period of ninety-nine years, with the privilege of renewal for a like period. On September 10, 1897, a deed was executed by the Belleville Company as party of the first part, and the Terre Haute Company as party of the second part, which purported to transfer the title to all the railroad properties of the said Belleville Company to the said Terre Haute Company in fee simple. On September 15, 1897, there was executed a lease by the Terre Haute Company, as lessor, and the Illinois Central Railroad Company as lessee, being a form of supplemental lease purporting to confirm the lease of April 4, 1896. On the 17th day of February, 1904, there was executed a deed by the Terre Haute Company and the Illinois Central Railroad Company, which purported to convey all the railroad properties, corporate rights, etc., of the Terre Haute Company in fee simple to the Illinois Central Railroad Company. The aforesaid leases and deeds are described in detail in the bill of complaint and in the exhibits attached thereto. The bill sets out in detail the effect of the various leases and deeds upon the properties of the Belleville Company and upon the four hundred shares of common stock which were held by complainant. It alleges that the Illinois Central Railroad Company secured sufficient stock in the Belleville Company and the Terre Haute Company to control said companies, and said control was secured and the aforesaid deeds and leases entered into in pursuance of a fraudulent scheme and plan of the Illinois Central Railroad Company to secure an entrance to the city of East St. Louis. The damage to the interest of the Belleville Company and to the interest of the minority stockholders and the grounds relied upon by the complainant to establish fraud on the part of the Illinois Central Railroad Company are set out in detail in complainant's bill, but are

not necessary to a decision of the question of jurisdiction involved in this appeal.

The complainant prays for a decree cancelling the lease dated April 4, 1896, the deed dated September 10, 1897, the supplemental lease dated September 15, 1897, and the deed dated February 17, 1904, so far as such leases and deeds affect the properties of the Belleville Company. And complainant further prays for the appointment of a receiver for the Belleville & Southern Illinois Railroad Company, and an accounting to such receiver or to the Belleville & Southern Illinois Railroad Company, by the Illinois Central Railroad Company, for such proportion of the yearly gross earnings of the Belleville Company as it was entitled to under the lease executed between the Belleville Company and the Terre Haute Company, dated October 1st, 1866, such accounting to date from the time the Illinois Central Railroad Company first acquired the railroad properties of the Belleville Company as lessee under the form of lease dated April 4, 1896. The bill also contains a prayer for general relief.

Service was had upon the Illinois Central Railroad Company, the Belleville Company and the Terre Haute Company, respectively, within the Eastern District of the State of Illinois. To complainant's bill the three railroad companies filed special pleas to the jurisdiction of the United States Circuit Court for the Eastern District of Illinois, alleging that they were, respectively, residents and inhabitants of the Northern District of Illinois, and were not residents or inhabitants of the Eastern District. These special pleas to the jurisdiction on complainant's motion were set down for argument.

At the argument of the pleas in open court, counsel representing the railroad companies took the position that the complainant's motion setting down the pleas for argument was equivalent to a demurrer, and placed in issue the question of the sufficiency of complainant's bill of complaint, and

demanded the right to argue in open court the merits of complainant's bill. Over the objection of complainant's counsel, counsel for the defendant railroad companies was permitted to argue to the court the general equity in complainant's bill, and did so argue, claiming that on the face of the bill complainant was not entitled to relief in equity, and that the bill should be dismissed for want of equity.

On December 20, 1905, a decree was rendered dismissing the complainant's bill for want of jurisdiction. On complainant's motion the decree of December 20, 1905, was set aside and complainant granted leave to file replications to the defendant's pleas to the jurisdiction, which replications to defendants' pleas were filed, denying the facts stated in the special pleas to the jurisdiction of the three railroad companies.

The evidence taken upon the plea of the Belleville Company on the issue thus raised was in substance as follows:

The offices and principal place of business of the Belleville Company from the date of its organization (1857) until October 23, 1896, is conceded to have been at Belleville, Illinois, within the present Eastern District of Illinois. On October 23rd, 1896, at a meeting of the stockholders of the Belleville Company, the following by-law was passed:

> "The annual meeting of stockholders for the election of directors and transaction of general business shall be held at the principal office of the Company in Chicago, on the third Wednesday of October each year. Notice of such meeting shall be given by the Secretary by one publication thereof in some newspaper published in the City of Chicago at least ten days before the time of such meeting."

During the year 1897 two formal meetings of the stockholders and two meetings of the directors were held in Chicago. Further than this, the Belleville Company has never transacted any business in any way, shape or form in Chi-

cago. The minute books of the stockholders' and directors' meetings, and the stock books, were sent to Chicago, and were kept in the offices of the Illinois Central Railroad Company. Except these books the Belleville Company has never owned any property or assets of any description in Chicago, not even a chair or desk. On October 23rd, 1896, the Belleville Company was the owner of a line of railroad within the Eastern District, which railroad at that time was leased to the Illinois Central Railroad Company.

On February 6, 1906, the Circuit Court entered a decree dismissing complainant's bill for want of jurisdiction. From this decree the present appeal is taken.

ASSIGNMENT OF ERRORS.

1. The Circuit Court of the Eastern District of Illinois erred in entering the decree dismissing complainant's bill for want of jurisdiction.

While this in reality is the fundamental error on which appellant relies, yet in order to comply more fully with the spirit of the rule laid down by this Honorable Court the appellant here summarizes the various reasons upon which it relies to establish that the Circuit Court of the Eastern District of Illinois had jurisdiction of complainant's bill.

a. That it appears from the complainant's bill of complaint that this suit is brought to enforce "an equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real estate" within the Eastern District of Illinois, and comes within Section 8 of the Act of March 3rd, 1875 (18 Stat. L. 472), entitled "An Act to determine the jurisdiction of the Circuit Courts of the United States, to regulate the removal of causes from State Courts, and for other purposes," as amended by the Act of March 3rd, 1887, and as corrected by the Act of August 13th, 1888.

b. That by demanding the right to argue, and by arguing the merits of the bill of complaint on the 11th day of December, 1905, in open Court, and by arguing at said place and time that the Court should dismiss said bill of complaint for want of equity, counsel representing the defendants, the Illinois Central Railroad Company, the Belleville & Southern Illinois Railroad Company and the St. Louis, Alton & Terre Haute Railroad Company, thereby entered a general appearance on behalf of said defendants, and thereby waived the personal right of said defendants to be sued only in the Northern District of Illinois, if any such right existed.

c. That from the evidence taken in open Court and made part of this record, it appears that the defendant, the Belleville and Southern Illinois Railroad Company is

an inhabitant of and resides within the Eastern District of Illinois, and that, therefore, under Sections 14 and 10 of the Act of March 3rd, 1905, creating the Eastern District of Illinois, the Circuit Court of the Eastern District of Illinois has jurisdiction of complainant's suit.

d. That by Sections 14 and 10 of the Act of March 3rd, 1905, creating the Eastern District of Illinois, the Circuit Court of said District was given jurisdiction of all causes in which the defendant is "found" within the District.

I.

THE CIRCUIT COURT OF THE EASTERN DISTRICT OF ILLINOIS HAS JURISDICTION OF THIS SUIT, BECAUSE IT IS A SUIT BROUGHT TO ENFORCE "AN EQUITABLE LIEN UPON OR CLAIM TO, OR TO REMOVE AN INCUMBRANCE OR LIEN OR CLOUD UPON THE TITLE TO REAL ESTATE" WITHIN THE EASTERN DISTRICT OF ILLINOIS, AND COMES WITHIN SECTION 8 OF THE ACT OF MARCH 3, 1875 (18 STAT. L. 472.)

Questions of the power of Courts over property within their jurisdiction without personal service of process upon the owners thereof, fall into two principal divisions: First, cases where the owner resides beyond the territorial jurisdiction of the sovereignty represented by the Court; and, secondly, where the owner resides beyond the jurisdictional limits of the particular Court, but within the bounds of the sovereignty represented by the Court.

The first class would be illustrated by a case, where the property is located in England, and the owner thereof resides in France. The power of the English tribunal would be limited by the general principles of fundamental law in reference to proceedings *in rem*. It would represent, in its purest sense a question of the Conflict of Laws. A similar question might arise between two States of our own Union. In such a case the power of the State Court having jurisdiction over the property would be further limited by the provisions of the Federal Constitution.

The second class of cases would be represented by a case where the property lies within the jurisdiction of one local court, and the owner resides within the jurisdiction of another local court, both within the same State. The State, having jurisdiction over both the person and the property, would enjoy perfect freedom in regulating the venue of suits. It might lawfully provide, and often does provide, that a personal suit could be brought against a defendant

in any county in which the defendant is served, without reference to the defendant's residence. Or it might provide that a defendant could be sued in any county in which he has real estate, and service made wherever defendant could be found within the State.

In the first class of cases mentioned above, the power of the Court over the property could only be determined by applying the common law doctrines in reference to local and transitory actions, and to proceedings *in rem*. In the second class of cases the first appeal must lie to the State Statutes which, if they cover the case, are controlling.

It is respectfully urged that the case presented by this appeal falls within the second class of cases mentioned above. The jurisdiction of the Federal Government being as broad as the bounds of the United States, it would be within the power of Congress to provide, if deemed proper, that a defendant could be sued in any Circuit Court in which the plaintiff elected to institute his suit, irrespective of defendant's residence, provided the suit were one over the subject matter of which the Constitution gave the Federal Courts jurisdiction.

It must be evident, therefore, that we are not primarily concerned, on this appeal, with the question as to whether or not the suit brought by the complainant is a local suit at common law, unless this question should prove of assistance in the interpretion of the Federal Statutes. Our first regard must be to the express provisions of the Congressional Statutes applicable to the case.

Section 1 of the Act of March 3, 1875 (as amended in 1887 and 1888) contains the following provision:

> "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of

different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This provision contains, in the form of a personal privilege to a defendant, a sweeping limitation on the venue of suits in the Federal Circuit Courts. Congress has, however, from time to time, created various exceptions to the personal privilege granted by the last portion of Section 1, and the exception upon which the complainant in this case relies is contained in the following language, found in Section 8 of the Act of March 3, 1875 (as amended in 1887 and 1888):

> "That when, in any suit commenced in any Circuit Courts of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear," etc.

Keeping in mind the absolute power of Congress to destroy entirely, if it should deem proper, the sweeping restriction on the venue of suits in the Federal Circuit Courts, contained in Section 1, we are, therefore, forced to an interpretation of the language used in Section 8.

Is the present suit brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud upon the title" to real property within the Eastern District of Illinois? If so, then the decree of the Circuit Court of the Eastern District of Illinois, dismissing this suit for want of jurisdiction, should be reversed.

The theory of complainant's bill is, that the Illinois Central Railroad Company has, by fraud, secured the execution by the Belleville & Southern Illinois Railroad Company of

certain leases and deeds, whereby the title to the properties of the Belleville Company has been transferred to the Illinois Central Railroad Company, and the complainant, as a stockholder in the Belleville Company, brings a minority stockholders' bill to have the said leases and deeds declared void. The bill is brought on behalf of the Belleville Company, and for the purpose of revesting in said Company the title to its railroad properties. The effect of a decree, as prayed by the complainant, will be to revest in the Belleville Company the title to its property. Is such a suit not an attempt "to enforce an equitable claim to," or to "remove an incumbrance or cloud upon," the title to real property? The only question primarily involved in the suit is the title to real estate. And it is directly, not indirectly, involved. The language used in Section 8 has been interpreted at various times. This Honorable Court has rendered two decisions on facts which are practically identical with those of the present case: Jellenik v. Huron Copper Mining Company, 177 U. S. 1, and Mellen v. Moline Malleable Iron Works, 131 U. S. 352.

In Jellenik v. Huron Copper Mining Co., a minoriay stockholders' bill was brought against the Huron Copper Mining Co. and certain of its directors and officers, alleging fraudulent mismanagement of the Company, a fraudulent assessment upon the stock of complainant and other stockholders, and a sale of said stock on account of failure to pay said assessment. The relief asked was the appointment of a receiver for the corporation, an accounting by the individual defendants to the corporation, and that the sale of complainant's stock and the stock of the other minority stockholders, so sold, should be declared fraudulent and void.

It was held that the suit fell within Section 738 of the Revised Statutes, being Section 8 of the Act of March 3, 1875. In the opinion, from which there was no dissent, is found the following:

"One of the objects of the present suit was to remove an encumbrance or cloud upon the title to certain shares of stock in a Michigan corporation. No question is made as to the jurisdiction of the Court so far as it rests with the diverse citizenship of the parties. The plaintiffs allege that they were the equitable owners of that stock, although the legal title was in certain of the defendants. The relief asked was a decree establishing their rightful title and ownership; and in order that such a decree might be obtained the defendants referred to were ordered to appear, plead, answer or demur; but as they refused to do so, the Circuit Court decided that it could not proceed further."

The opinion then proceeds to discuss whether the stock in question was personal property within the District, within the meaning of Section 738, and decided that it was, and that the decree of the Circuit Court dismissing the bill for want of jurisdiction was erroneous.

In Mellen v. Moline Malleable Iron Works, it became necessary for the Court to decide with reference to the jurisdiction of the Circuit Court of the United States for the Northern District of Illinois over a certain suit in equity which had been instituted by the National Furnace Co. against the Moline Malleable Iron Works. The character of the suit in question is described in the pleadings (page 357) as follows:

"That long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen, in trust for the use and benefit of said Sophia H. Boyd, his interest in said trust deed and chattel mortgage as alleged in said bill of complaint, to-wit: on the 2d day of July, 1883, the said National Furnace Co. in its own behalf and on behalf of all the creditors of Moline Malleable Iron Works, exhibited its original bill of complaint in this Honorable Court, and made parties defendant thereto said Moline Malleable Iron Works * * *, thereby stating, among other things, that said National

Furnace Co. was a creditor of said Moline Malleable Iron Works, and that at the time when the said Moline Malleable Iron Works executed the said trust deed and chattel mortgage it was insolvent, and its indebtedness was largely in excess of its capital stock, and that its officers and directors had assented to the creation of this indebtedness, and that the said conveyances were fraudulent and void as against creditors of said Moline Malleable Iron Works; and therein and thereby prayed, among other things, that a receiver might be appointed to take charge of and manage the property of said corporation under the orders of this Court, and that the said trust deed and chattel mortgage might be held and adjudged fraudulent and void as against said National Furnace Co. and creditors of said Moline Malleable Iron Works."

It appears, on page 362, that counsel argued that the National Furnace Co. had neither a legal nor an equitable lien upon or claim to the property covered by the trust deeds, and that the Furnace company was only a general unsecured creditor of the Moline Malleable Iron Works, and that, therefore, the case did not fall within Section 738. In answer to this argument, this Court used the following language:

"Was the decree in the suit instituted by the National Furnace Co. (to be hereafter called the Furnace Company) against the Moline Malleable Iron Works (to be hereafter called the Iron Works) and others, declaring that Hill was not entitled to a lien or security by reason of the trust deed and chattel mortgage of June 23, 1883, void for want of jurisdiction in the Court that rendered it? This is the principal question in the present case. Its solution depends upon the construction of the eighth section of the Act of March 3, 1875, determining the jurisdiction of the Circuit Court of the United States. 18 Stat. 472, c. 137, section 8.

"That section authorizes an order to be made direct-

ing an absent defendant in any suit brought in a Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud upon the title, to real or personal property *within the district where such suit is brought*— * * * The previous statute gave the above remedy only in suits 'to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought,' while the act of 1875 gives it also in suits brought 'to remove any incumbrance or lien or cloud upon the title to' such property. Rev. Stat. Sec. 738; 18 Stat. 472, c. 137, Sec. 8.

"We are of the opinion that the suit instituted by the Furnace Company against the Iron Works and others belonged to the class of suits last described. The trust deed and chattel mortgage in question embraced specific property within the district in which the suit was brought. The Furnace Company, in behalf of itself and other creditors of the Iron Works, claimed an interest in such property as constituting a trust fund for the payment of the debts of the latter, and the right to have it subjected to the payment of their demands. In Graham v. Railroad Co., 102 U. S. 148, 161, this Court said that 'when a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.' See also Mumma v. Potomac Company, 8 Pet. 281, 286; County of Morgan v. Allen, 103 U. S. 498, 509; Wabash etc. Railway v. Ham, 114 U. S. 587, 594; 2 Story's Eq. Jur. Sec. 1252; 1 Perry on Trusts, p. 242. The trust deed and chattel mortgage executed by the Iron Works created a lien upon the property, in favor of Wheeler, Carson, Hill and the Keator Lumber Company, superior to all other creditors. The Furnace Company, in behalf of itself and other unsecured creditors, as well as Wheelock, denied

> the validity of Hill's lien as against them. That lien was, therefore, an incumbrance or cloud upon the title, to their prejudice. Until such lien or incumbrance was removed, they could not know the extent of their interest in the property or in the proceeds of its sale. The case made by the original, as well as cross-suit, seems to be within both the letter and the spirit of the Act of 1875."

If a suit brought by an unsecured creditor of A to set aside a deed made by A to B, as in fraud of creditors, is within Section 738, can there be any doubt that a suit brought by A to set aside a deed obtained from him by B through fraud, is also within said section? And what is the distinction between a suit brought by A to cancel a deed obtained through fraud by B, and a suit by A to cancel a sale made through fraud of B?

The cases of McBurney v. Carson, 99 U. S. 567, and Goodman vs. Niblack, 102 U. S. 556, are helpful and illustrate the fact that Section 738 has never been confined to actions which were strictly local at common law.

The facts in McBurney v. Carson were, briefly, as follows: A, seized of lands situated in South Carolina, died in 1856. By his last will and testament he appointed B his executor, with power to sell and hold the proceeds in trust for his widow and two minor children. B sold the lands in 1857 to C for $50,000, receiving therefor $15,000 in cash and the latter's bonds for the deferred payments, secured by a mortgage on the lands, which was duly recorded. In 1863 C sold the lands to D for $100,000 in Confederate Treasury notes. In that currency C paid his bonds to B, who surrendered them, entered the mortgage as satisfied, and invested the currency in Confederate bonds. The children, having come of age in 1866, assigned their interest in the estate to their mother, who resided in New York, and she, on the ground that the surrender of C's bonds and the can-

cellation of the mortgage were procured by fraud, brought her bill to set aside the cancellation of the mortgage as fraudulent and void. The bill was brought in the Circuit Court of the United States for the District of South Carolina, and C, who was a resident of New Jersey, was notified under the terms of the Act of June 1, 1872 (17 Stat. 198, p. 13). It was held by this Honorable Court, without dissent, Mr. Justice Swayne delivering the opinion, that the aforesaid statute was applicable to the case.

Mr. Justice Miller delivered the opinion in Goodman v. Niblack, and we recite the following extracts therefrom:

> "There came into the hands of Niblack as administrator de bonus non of the estate of Albert G. Sloo, the sum of $150,000, and the complainant is the owner of a judgment against Sloo for $31,344.44, recovered in the Supreme Court of the State of New York on the 20th day of January, 1855. The purpose of the present bill is to follow this money in Niblack's hand as a trust fund devoted by Sloo in his lifetime to the payment of that judgment. * * *
>
> "This is a proceeding in equity to enforce a lien on the fund which is within reach of the Court, and as trustees and complainant have the requisite citizenship, Section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear the suit will proceed as usual. If they do not appear the decree, so far as it affects the funds in the hands of Niblack, will bind them; and this is all that is necessary to give the Court jurisdiction to grant the relief prayed for by the complainants."

We desire, also, to cite the following decisions of the Circuit Courts:

Evans v. Charles Scribner's Sons, et al., 58 *Fed.* 303 (1893):

> "The purpose of the bill is two-fold: First, to require the defendants Scribners' Sons to bring into Court and to have cancelled as fraudulent a deed of

conveyance to certain real estate in the city of Atlanta and this District, which deed is alleged to have been obtained by duress and fraud. The value of the real estate, as the pleadings now stand, is alleged to be more than $2,000. * * * An order was granted under Section 8 of the Act of March 3, 1875, for service on Scribners' Sons. * * * Service was made under the order. * * * Yet so far as this bill seeks to set aside a deed to the real estate in question service seems to be entirely proper."

Cowell v. City Water Supply Co., et al., Circuit Court, Southern District of Iowa, 1899. 96 *Fed.* 769:

"But the subject matter of the suit, to-wit: cancellation of mortgages upon real estate within this District is of a local nature, and, therefore, is properly brought within this district wherein the property and real estate so mortgaged is situated. (Northern I. R. Co. v. Michigan Central R. Co., 15 Howard, 232, 243); as such the suit, if the amount in controversy is sufficient, could originally have been instituted in this Court, with the parties plaintiff and defendant as now named in the bill."

McGee, et al., v. Marietta & N. G. R. R. Co. et al., 48 *Fed.* 243 (1891):

Central Trust Co. of New York filed its bill against Marietta & North Georgia Railway Co. to foreclose a mortgage executed by said Railway Co. Subsequently McBee, as co-complainant, filed a bill against complainant and defendant in the first named bill and a large number of other firms and corporations, alleging that a portion of the railway covered by the mortgage was built by the Knoxville Southern Railroad Co.; that the complainants were lien creditors of the road; that the mortgage aforesaid in favor of bondholders is void, so far as the line built by the Knoxville Southern Railroad Co. is concerned, or if not void, is subject to the prior liens of the creditors of the Knoxville Southern Rail-

road. The bill asked for in injunction against the foreclosure of the mortgage by Central Trust Co. so far as the road built by the Knoxville Southern was concerned, for the appointment of a receiver for the sale of that railroad, and for the application of the proceeds to the debts of complainants and other creditors. It was held that the bill by McBee and co-complainants fell within the Act of March 3, 1875.

Castello v. Castello and others (*C. C. W. D. Mo.*) 14 *Fed. Rep.* 207: *Head Note*:

"2. Same—'Cloud on Title—Equitable Relief—Jurisdiction. When a complainant alleges in her bill that she was fraudulently induced to execute an agreement to receive less than her lawful share of her husband's estate, and that the estate is being divided according to such fraudulent agreement instead of being distributed in accordance with the laws of the State where it is being administered, the suit must be considered as instituted 'to remove a cloud upon title to personal property' within the meaning of Section 8 of the Act of March 3, 1875, and as calling for equitable relief within the jurisdiction of the United States Circuit Court."

p. 209:

"* * * Looking at the object of the bill, it mainly seeks to remove a lien or cloud upon her interest in the estate and property of her husband. That this estate passed into the hands of the public administrator, and may have been by him converted into money before this time, can make no difference. The question is, is she entitled to a different share or part of the estate and property of her husband than is provided for in the instrument of writing under which defendants claim, and which she alleges was obtained by deceit and fraud? The jurisdiction over questions of this kind by the Courts of the United States, when invoked by a distributee and citizen of another State, has

been determined by the Supreme Court in Payne v. Hook, 7 Wall, 425, and decisions since.

"The instrument sought to be set aside may, with no great impropriety, be called a lien upon the amount for final distribution of the estate of James O. Castello, for the defendants assert their title to the proceeds under it. At any rate, it is a cloud upon her title as long as it stands, and is made the basis of claims adverse to her interest."

Single v. Scott Paper Mfg. Co., et al., 55 Fed. 553 (1893):

This was a suit by complainant against defendant and others, non-residents, to enforce the specific performance of a contract to convey real estate. Held that the court has jurisdiction under Section 8, Act of March 3, 1875.

"Complainant in this case is a non-resident of the District, and a citizen of the State of New York. Defendants, who claim an interest and title to the real estate in controversy are all residents and citizens of the State of Michigan. The property in dispute lies wholly within the Western Division of this District. The question, therefore, presented is whether this Court, in a suit in which neither the plaintiff nor defendant reside in this District, but are citizens of other States can acquire jurisdiction and determine controversies between parties when the real estate in controversy lies wholly within the jurisdiction of the Court. * * *

"The next important question to determine is whether a bill for a specific performance constitutes a legal or equitable lien upon or claim to or to remove an incumbrance or lien or cloud upon a title to real or personal property. * * *

"If there were doubt as to whether, under the general equity rules and principles administered by this Court, aided by the provision of Section 738, the defendant can be brought within the jurisdiction of the Court without personal service, the authority of the Court to entertain such jurisdiction and administer the relief sought is made more certain and effective by reason of

the Ohio Statutes. Section 5024, of the Revised Statutes of Ohio, authorizes an action to compel a specific performance of the contract for sale of real estate. Section 5048 provides for constructive service in such cases. Section 5318 provides that when a party against whom a judgment or a conveyance * * * is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect and be as available as if the conveyance * * had been executed conformable to such judgment. Considering these statutory provisions in the light of the principles announced in the case of Boswell's lessee v. Otis above quoted, our jurisdiction in this case seems clear."

As we will attempt to show in another portion of this brief, a suit for the specific performance of a contract for the sale of land may be either a suit *in personam* or a suit *in rem*, or *quasi in rem*.

It is very easy to establish that Section 738 is meant to include more than suits that were local at common law.

In the opinion in *Greeley v. Lowe*, 155 *U. S.* 58, 70, it is said:

"The law remained in this condition until 1872, when Congress, apparently to remove the difficulty suggested by these cases, passed an act, Act of June 1, 1872, c. p. 225, 17 Stat. 196, p. 13, subsequently incorporated into the Revised Statutes as section 728, providing that 'when any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill, at a certain day therein to be designated," etc. And then follows the provision in section 739, that 'except in the cases provided by the preceding section (738) no civil suit shall be brought in any other district than that of which the defendant

> is an inhabitant,' etc. The 'next three sections' are section 740, in which special provision is made for States containing more than one district, requiring the defendant, if a single one, to be sued in the district where he resides, but if there are defendants in different districts, suit may be brought in either, and a duplicate writ issued against residents of the other districts; section 741, wherein provision is made for suits of a local nature where the defendant resides in a different district in the same State from that in which the suit is brought, permitting process to be served in the district where he resides; and section 742, providing that in any suit of a local nature at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, within the same State, suit may be brought in the Circuit or District Court of either district, etc. These sections—740, 741 and 742—are 'the next three sections' mentioned in Section 739 as exceptions to the general rule that no civil suit shall be brought against an inhabitant in any other district than his own."

It therefore appears, as the law stood after the Act of June 1, 1872, went into effect, that there were four exceptions to Section 739, one of which was Section 738 and another of which was Section 741, in reference to "local" suits. If Section 738, as it stood in the Act of 1872, did not embrace other suits than local suits, then it was a nullity. Furthermore, the language of Section 738 was broadened in the Act of 1875 by the addition of the words "or to remove any incumbrance, or lien, or cloud upon the title to."

The various States, in the exercise of their arbitrary right to control the venue of suits within their borders, have enacted Statutes, the language of which is sometimes more restricted, and sometimes broader in effect, than the language of Section 738. In deciding the effect of the words used in Section 738, some of the State decisions may be of benefit. *McLaughlin v. McCrory*, 55 *Ark.* 442 (1892)

Held that "a suit to cancel a fraudulent deed of land and revest title in the plaintiff is an action 'for the recovery of real property or an estate or interest therein,' within Section 4994 Mansf. Digest, which must be brought in the county where the land lies, and may be prosecuted against a non-resident defendant by publication."

In the opinion of the Court is found the following expression:

> "Now if it be true that a Court of equity may cause a deed to be cancelled by acting *in personam*, as in a transitory action, it is certain that when it attempts to accomplish that result by the force of its own decree it acts *in rem*."

And the following:

> "So far, then, from being confined to acting *in personam*, Courts of this State are empowered to annul a deed and establish title to lands within their jurisdiction by mere force of their decrees. To that extent their action is *in rem*."

Adams v. Cowles, 96 *Mo.* 501:

Section 3494 of the Revised Statutes of Missouri, 1879, provided for publication against non-residents, as follows:

> "In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust and for the enforcement of mechanics' liens and all other liens against either real or personal property and in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the Court."

The question before the court was whether or not a suit brought to set aside a deed as being a fraud of creditors was within the foregoing statute. It was argued by coun-

sel (page 503) that "it was not an action for the recovery of the land nor to enforce the right, claim or demand to or against it. It was a personal action for relief against an alleged fraud." The Court, however, held that the suit fell within the statute.

Judge Gantt, speaking for the Court, says (page 506:)

> "If the deed to William C. Glenn was fraudulent, then it was void as to Ferris, and that fact could be shown in ejectment. But Ferris had the further right to have the fraudulent deed cancelled and in effect erased from the public records, and to do this while the evidence was at hand. The relief asked is the establishment of a right to real property, and comes within the statute allowing the service of notice by publication."

Acker v. Leland, et al., 96 *N. Y.* 383 (1884:)

> "The action is brought to set aside a general assignment for the benefit of creditors made by the defendant Leland to his co-defendant, on the ground that it was made with intent to hinder, delay and defraud the plaintiffs and other creditors of the assignor. It appears from the affidavits in the schedules that the assignment comprised real and personal property, the principal part of which consisted of real estate situated in the counties of Albany and Saratoga. * * *
>
> "The action was, therefore, local, and triable either in the county of Albany or the county of Saratoga, under Section 982 of the Code. It was an action to procure a judgment annulling the title and affecting an estate of real property."

Section 982, referred to, is as follows:

> "Each of the following actions must be tried in the county in which the subject of the action or some part thereof is situated; * * * and every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling, or otherwise affecting an estate, right, title, lien, or other interest in real property or a chattle real."

We respectfully submit that the foregoing authorities establish that the present suit brought by complainant is a suit brought "to enforce an equitable claim to" or, "to remove an encumbrance or cloud upon" the title to real estate within the Eastern District of Illinois. We have hitherto urged that this is so, based upon the specific language used in Section 738, and irrespective of the question, as to whether or not the present suit is "local," as determined by the principles of common law. However this may be, no one will urge that Congress intended to exclude from Section 738 any suit which would have been "local" at common law, and, to strengthen our position, we will cite authorities to show that at common law the suit brought by complainant would have been local and not transitory.

Chapin et al. v. Dodds, 104 *Mich.* 232 (1895:)

Held that a suit by an assignee of an insolvent debtor to set aside as fraudulent a conveyance of lands is local, and must be filed in the county where the land is situated.

> "The writ must be granted. The Statutes provides that every suit in chancery shall be commenced in the Circuit Court for the county in which the property in dispute is situated, if the subject matter is local. How. Stat. Sec. 6612. It has frequently been held under this Statute that bills in equity affecting interests in real estate must be filed in the county where the lands or some portion of them are situated. Godfrey v. White, 43 Mich. 171; Krolik v. Bulkley, 58 Id. 411; Rankin v. Rothschild, 78 Id. 10."

McKenzie et al. v. Bacon, et al., 38 *La. Ann.* 764 (1886:)

> "Poche, J. Plaintiffs brought their action for the dissolution of a sale of an immovable for non-payment of the price, and filed it in the Parish of Caddo, where the property is situated. They sought to bring the non-resident heirs of the original vendee into court by means of the appointment of a curator ad hoc. The

other and successive vendees and their legal representatives are all residents of the State.

"The curator excepted to the jurisdiction of the Court on the ground, substantially, that the non-resident defendants, who own no property in this State, and against whom no attachment has been sued out, could not be cited in the mode proposed by plaintiffs, which mode does not constitute 'due process of law' within the meaning of the fourteenth amendment to the constitution of the United States.

"This appeal is taken from a judgment maintaining that exception and dismissing the suit.

"The principal contention of the curator involves the proposition that an action for the dissolution of a sale for non-payment of the price, having for its object the recission of a contract, is purely a personal action, in which the respective defendants, vendees, are not sued jointly, and that, therefore, non-resident defendants cannot be legally brought into Court by process of citation on a curator ad hoc.

"The argument is not tenable, and finds no support in the authorities on which it is predicated.

"The demand of plaintiffs is two-fold in its character; it embraces the dissolution of the sale and the possession thereunder of the property. The pith of the controversy under the issues thus tendered presents the question of the title or ownership of immovable property.

"The demand for the dissolution of the sale is a necessary step required by law as a means of acquiring possession of the property by the vendor, and that feature of the proceeding cannot be invoked as solely characterizing the nature of the action. The law provides that under the effect of the resolutory condition the contract is not dissolved of right by the failure of either of the parties to comply with his engagements; the dissolution must be judicially enforced. C. C., Arts. 2045, 2046.

"The legal effect of the dissolution of a sale under the resolutiory condition is to place matters as though the sale had never existed; hence it follows that the

practical result of the judgment enforcing the condition is to restore the ownership and the possession of immovable property to the previous owner, the complaining vendor.

"These conditions lead to the inevitable conclusion that such a proceeding is not a purely personal action as contemplated in our Code of Practice, and as understood in jurisprudence, but that it partakes of the nature of a proceeding *in rem*."

A proceeding *in rem*, strictly construed, is one taken directly against the property, in which the property itself is actually impleaded, as in the case of a libel in admiralty. But to determine the locality of an action, a proceeding *in rem* is construed more broadly, and embraces many actions brought against individual defendants, proceedings which properly, perhaps, should be called *quasi in rem*. The principle was stated by this Honorable Court in *Pennoyer v. Neff*, 95 *U. S.*, 734, as follows:

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title to individual claimants; but in a larger and more general sense the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them or by some interest therein."

Markham v. Powers, 9 *S. W.* 255 (*Ky.*) (1888.)

"An action to set aside a conveyance of land and subject it to the payment of a judgment, may be brought in the county where the land is, although the judgment was recovered and the debtor lived in another county."

Quarl v. Abbett, 102 *Ind.* 233 (1885:)

This was a suit by a creditor to set aside a transfer of stock by his debtor to a third party, on the ground that the transfer of said stock was fraudulent. Held, that such

suit could be brought in the courts of Indiana and the defendant, a non-resident, brought in by publication.

Lane v. Innes, 43 *Minn.* 137, 141 (1890:)

> "3. By section 5046, Rev. St. U. S., all property conveyed by the bankrupt in fraud of his creditors shall, by virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. A judgment creditor claiming a lien upon the real property of his debtor may bring an action to remove the obstruction caused by a fraudulent conveyance before selling the property, or he may acquire title by execution sale, and then bring his action. Jackson v. Holbrook, 36 Minn. 494, 499, (32 N. W. Rep. 252); Wadsworth v. Schisselbauer, 32 Minn. 84; (19 N. W. Rep. 390). The object is to remove the obstruction or uncover the property, so that it may be disposed of at the best price, and the proceeds appropriated to the satisfaction of demands of creditors. That is substantially the nature of the action brought by the assignee against this plaintiff. Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 300 (5 Sup. Ct. Rep. 135;) In re Gurney, 7 Biss. 414; Rinchey v. Stryker, 28 N. Y. 45, 31 N. Y. 140. The action was not then an action *in personam,* but must be classed with actions *in rem.* The judgment sought to be recovered therein affects the land only, and it was an action where service by publication upon the non-resident defendant was proper, and one which falls within the provisions of Gen. St. 1878, c. 66, section 64, subd. 5. Pennoyer v. Neff, 95 U. S. 714, 733. See Bennett v. Fenton, 41 Fed. Rep. 283."

It was argued by counsel for appellees at the hearing in the Circuit Court that the suit brought by complainant could have been brought in the Circuit Court for the Northern District of Illinois, and a personal decree against the defendants secured, compelling them to reconvey the property to the complainant, therefore the suit was not "local." This is a *non sequitur.* The personal jurisdiction of equity

to compel a defendant to convey property in a foreign jurisdiction, has never been held to be a restriction on the power of the foreign Court, which has jurisdiction over the property, to adjudicate in reference to the title thereto, nor has it any effect in determining the question of the locality of an action. Except as limited by certain State Statutes, there are few suits "local" at common law, which cannot, under the modern doctrines of equity, also be brought in the jurisdiction in which the defendant can be served. The following statements from Brown on Jurisdiction are helpful:

Brown on Jurisdiction, p. 167:

> "* * * The following actions were local at common law: All actions for the recovery of real property or any interest therein, or the enforcement of any lien thereon, or the enforcement of the specific performance of a contract concerning the same where the property is claimed."
>
> "The statutes of the different states usually provide that actions shall be brought in the county or district where the defendants, or some of them, if more than one, reside. But, in general, the statute provides that real actions, or actions relating to real property, shall be brought in the county where the property lies. If the statute does not so provide, the action would be local by common law rules, which are usually adopted in this county by general consent. In order, therefore, to commence an action, local by common law, it is necessary to see that the statute makes express provision for the trial of it as a transitory one. Where the action is local, the venue must be laid in the county in which the land is situated, unless it is otherwise provided by statute."

p. 171, *Note*:

> "A 'real action' is brought for the specific recovery of lands, tenements or hereditaments. It includes every form of action where the judgment is for the title and possession of the land demanded; as, ejectment."

p. 172:

> "* * * Actions for waste, for the foreclosure of mortgages, for the quieting of title, for specific performance of contracts, for the sale of real estate, for the establishing of vendors' liens, ejectment and rents of the class before mentioned, must be commenced as local actions."

p. 171:

> "Notwithstanding the rule of law applied to the *lex rei sitae* to immovable property, in some cases the court of chancery where parties are domiciled has compelled parties within their jurisdiction to take action with regard to foreign real estate; sometimes by injunction to compel specific performance of agreements for its sale; sometimes an injunction will be granted to restrain a suit in the foreign tribunal for the recovery of such realty where situated, and even reconveyance and releases ordered in the domestic courts where the parties reside, when the contract has been fraudulently obtained by which an interest in such foreign lands has been acquired. In all such cases, however, the relief asked, or granted, must be limited by a decree enforcing personal obedience as against the defendant; it cannot in any manner affect the property situated beyond the jurisdiction."

See, also Wharton on Conflict of Laws, p. 641, 650; Story on Conflict of Laws, Sec. 544.

In support of the contention that the present suit could have been brought in the Northern District of Illinois, counsel for the appellees cited in the Circuit Court the case of Massie v. Watts, 6 Cranch, 148.

Massie v. Watts was an appeal from a decree of the Circuit Court of the United States for the District of Kentucky, in a suit brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former one thousand acres of land in the

State of Ohio, defendant having obtained the legal title with notice of the plaintiff's equitable title.

On page 158 is found the following statement by Chief Justice Marshall:

> "Taking into view the character of the suit in chancery brought to establish a prior title originating under the Land Law of Virginia, against a person claiming under a senior patent, considering it as a substitute for a caveat introduced by the peculiar circumstances attending those titles, this Court is of the opinion that there is much reason for considering it as a local action, and for confining it to the Court sitting within the State in which the land lies. Was this cause, therefore, to be considered as involving a naked question of title? Was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

There is nothing in the opinion of Justice Marshall, in Massie v. Watts, to indicate that Watts could not have brought his bill in Ohio, where the land was situated. In fact, Justice Marshall felt that "there is much reason for considering it as a local action, and for *confining* it to the Court sitting within the State in which the land lies."

A suit for the specific performance of a contract is less "local" in its nature than a suit to set aside a deed secured by fraud, but the former has been regarded as a "local" proceeding, as well as one which could be made "transitory." *Boswell's Lessee v. Otis*, 9 *Howard*, 336:

Although the judgment in that case was held to be void, yet with reference to the jurisdiction of the Court in the case of specific performance of a contract alone, the Supreme Court said:

> "Jurisdiction is acquired in one of two modes: First, as against the person or defendant by service of process; secondly, by procedure against the property of the defendant within the jurisdiction of the Court. In the latter case the defendant was not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by attachment or bill in chancery. It must be a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a proceeding is authorized by the Statute on publication without personal service of process it is substantially of that character."

Burrall v. Eames, 5 *Wis.* 260, (1856:)

Held, a suit for the specific performance of a contract for the sale of land is of a two-fold character, partly *in personam* and partly *in rem*. That the Court may enforce the contract, either by operating on the person to compel a conveyance, or may pass the title to the land by decree.

> "A suit for specific performance, like that of foreclosure, is of a two-fold character, partly *in personam* and partly *in rem*. The Court may enforce the contract, either by operating upon the person to compel a conveyance, or may pass the title of the land by decree. If the defendant is a non-resident, certainly the proper county in which to file the bill would be that in which the land is situated; and it would seem that as the sole object of the suit is to subject the specific property to the jurisdiction and control of the Court, the county in which it is situated is the proper county in which to commence the suit, although the defendant may reside in another county in the state. There is nothing in the Statute which precludes such practice; it is

agreeable to the usual practice of Courts of equity in other jurisdictions, is the most convenient and safe for all the parties, and ought to be sustained."

Gartrell v. Stafford, 12 *Neb.* 545, (1882:)

"Maxwell, J.

"This is an action to enforce the specific performance of an alleged contract for the conveyance of real estate. The land in controversy is situated in Gage County, and the plaintiff is a resident of that county, while the defendant is a resident of California. * * *

"The first objection made by the appellant is, that an action of this kind can only be brought where the defendant resides or may be summoned. But this objection is not well taken. An action to enforce specific performance of a contract for the conveyance of real estate is of two-fold character, viz: *in rem* and *in personam.* In the one case the decree of the Court operates directly upon the land. In the other, where the Court has jurisdiction of the parties, it may compel them to perform, although the land may be situated outside of the State. Story Eq. Jur. Secs. 743, 744. Bailey v. Ryder, 10 N. Y. 363; Newton v. Bronson, 13 Id. 587; Gardner v. Ogden, 22 Id. 327; Cleveland v. Burrall, 25 Barb. 532; Fenner v. Sanborn, 37 Id. 610; Burrall v. Eames, 5 Wis. 260 .There is no doubt that an action may be brought against a non-resident in the county where the land in controversy is situated."

Owen v. Hall, 13 *Ohio State,* 571, (1862:)

Action for specific performance of contract for sale of real estate. Held:

"1. The action may be brought either in the county where the land lies or in that where one of the defendants resides."

Harris v. Palmore, 74 *Ga.* 273, (1884:)

A bill for the specific performance of a contract to convey

land situated in Georgia held properly brought in the state court of Georgia against a non-resident.

"4. And even if the prayer for specific performance, and the demand that the Court direct the New York defendants to the bill to make title to complainant, made it a proceeding *in personam* against them, and, not having them in Georgia, its Courts could not well enforce the decree to compel them to execute the titles, yet there is the broad prayer for general relief—such relief as a Georgia Court can give, and that is easily given by a decree that the land is the complainant's, and thus the decree itself puts the title in complainant, and quiets her possession to the land, and removes all clouds from hef title and her quiet enjoyment of the land she bought and paid the New York people for. So, equity can settle the case, as respects the land, within Georgia jurisdiction, without forcing the defendants to do anything at all, and without any decree, except that which, by its own operation, fixes title in him who has the perfect equity to a piece of the soil of this State.

"Let it be borne in mind that the principle contended for by the able and energetic counsel for the plaintiffs in error would exclude the jurisdiction of the Courts of Georgia as well in cases against foreigners beyond seas—actual foreigners to the American Union—as to citizens of other States in the Union. Its enormity will thus become more apparent. Every foreigner to Georgia, in or out of the American Union, who owns land or other property in this state, can be made to pay any debt he owes here out of such property. It can be attached and made to pay such debt, chose in action or debt of any sort; yet the contention of the plaintiffs in error is that, while the foreigner can be forced by our Courts to pay his debts out of property here, our Courts have no power to settle land titles against him or quiet the possession thereof. It cannot be.

"5. Of course, the equity Courts of this state having jurisdiction, the Court where the land lies is that

which peculiarly has the jurisdiction to grant relief *in rem.* See 30 Ga. 440."

But the Circuit Court of the Northern District of Illinois could not give full relief in this case. The bill contains a prayer for general relief. If, on account of the intervening rights of third persons, or for any other equitable principle, the Court would refuse to cancel the leases and deeds, it is well established that the Court could and would give the complainant an equitable lien upon the properties in the hands of the defendant, the Illinois Central Railroad Company, for an amount equal to the value of complainant's stock. This relief could only be given by the Circuit Court for the Eastern District of Illinois.

Furthermore, the bill asks for the appointment of a receiver for the defendant, the Belleville & Southern Illinois Railroad Company. The entire assets of the last named company, being within the Eastern District, only the Circuit Court of that District would have jurisdiction to appoint the receiver. A suit for the appointment of a receiver is "local." East Tennessee, etc. R. Co. v. Atlanta, etc. R. Co., 49 Fed. 608.

We respectfully submit that the complainant's suit is a "local" one, that it falls directly within the express language of Section 738 of the Revised Statutes; and that the Circuit Court of the Eastern District of Illinois had jurisdiction thereof.

II.

THE DEFENDANT RAILROAD COMPANIES HAVE WAIVED THE SPECIAL APPEARANCE AND HAVE ENTERED A GENERAL APPEARANCE.

On p. 60 of the Transcript, in the order entered by the Circuit Court on December 28th, 1905, is contained the following finding of fact:

> "and the Court finds that at the argument of the pleas to the jurisdiction set down for argument and heard on the 11th day of December, 1905, the defendants, by their counsel, contended that the question of the sufficiency of the bill was in issue the same as if a demurrer to a plea had been filed. The complainant objected to any argument of the merits of the bill, and contended that the sufficiency of the bill was not in issue. The Court suggested doubt whether the sufficency of the bill was in issue and permitted the defendant's counsel to argue the question of the sufficiency of the bill in order that such argument might be considered in case the Court should conclude that the sufficiency of the bill was involved in the disposition of the pleas. Thereupon the defendant's counsel argued that the Court ought to dismiss the bill for want of equity, but no motion to that effect was made by defendants."

Complainant had filed what was in substance a demurrer to defendants' pleas to the jurisdiction. Defendants' counsel contended that a demurrer to a plea to the jurisdiction, like a demurrer to a plea to the merits, would raise the question of the sufficiency of complainant's bill, and argued, over complainant's objection, that there was no equity in the bill and that the Court should dismiss the bill for want of equity.

Defendants will doubtless contend that a general appearance was not entered because no formal motion was filed. It is not necessary to cite to this Honorable Court the vari-

ous decisions as to what acts on the part of a defendant constitute a general appearance. We assume that the defendants' counsel will not contend that a general appearance would not have been entered, if a formal motion to dismiss the bill for want of equity had been filed. Instead of filing this formal motion, defendants' counsel, at the hearing, took the position that complainant, by its own pleading, had put in issue the sufficiency of the bill, and demanded the right to, and did argue that there was no equity therein.

A formal motion is not necessary to waive a special appearance. For example, the mere consenting to a continuance of a cause will amount to such waiver. See Stanton v. Proprietors of Haverhill Bridge, 47 Vt. 172; St. Louis, etc. Ry. Co. v. Barnes, 35 Ark. 95.

The principle to be extracted from the cases is, that any act which recognizes the power of the Court over the controversy will amount to a general appearance.

3 *Ency. of Law & Proc., p.* 504:

> "Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in Court will amount to a general appearance."

2 *Ency. of Pl. & Pr., p.* 636:

> "Any pleading to the merits by means of an answer, plea, or by any informal manner attacking plaintiff's case, is a general appearance."

In Porter v. Chicago & N. W. Ry. Co. 1 *Neb.* 14, it is said:

> "I think a defendant may appear specially to object to the jurisdiction of the Court, either over his person or the subject matter of the suit, without waiving his right to be heard on the question in bank. But if, by motion or by any other form of application to the Court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to

have appeared generally. Such application concedes a cause over which the Court has power to act."

In the present case the action invoked in open Court by the defendants, a dismissal of the bill for want of equity, could only have been asked upon the supposition that the Court had jurisdiction. How could the Court have dismissed the bill for want of equity, if the Court had no jurisdiction? The position taken by the defendants was wholly inconsistent with their special pleas to the jurisdiction, and the latter were waived.

If the Court had taken the position, so eloquently argued for by the defendant's counsel, and had entered a decree dismissing the bill for want of equity, would the defendants, thereafter, have been permitted to say that they were not in court, or would the complainant have been entitled to have the decree set aside, and an opportunity to argue the equity of the bill? If a defendant, by merely consenting to a continuance, enters a general appearance, does he not do so where, by his eloquent appeal, he induces the Court to enter a dismissal on the merits? Nor does the fact that these defendants failed in their appeal, change the situation. The defendants secured the advantage of an elaborate argument of the merits of complainant's bill, and they must bear the disadvantages. That the defendants gained an improper advantage by the argument of the merits of the bill will be seen by reading the decree entered by the Circuit Court on December 18th, 1905.

"It is ordered, adjudged and decreed by the Court that the said respective pleas of the defendants herein are sufficient in law and do deprive this Court of jurisdiction of the persons of the said defendants and each of them. *And the Court having looked into the bill of the complainant to determine if a local action is therein stated, doth consider, order, adjudge and decree that the facts in said bill stated and contained are*

insufficient in law or equity as grounds for setting aside or concelling the several instruments therein described, or either of them, and the said suit is not local to this district, and therefore the suit is dismissed for want of jurisdiction. (The italics are inserted.)

In other words, the Circuit Court seems to hold that the suit is not local, because there is no equity in complainant's bill. By arguing the merits of the bill, counsel for the defendants evidently scored a point.

We respectfully submit that the defendants have endeavored to call into action a power of the Court which could only be exercised upon the assumption that the Court had jurisdiction and, therefore, the defendant Railroad Companies have waived their special appearance, and have entered a general one.

III.

IT APPEARS FROM THE EVIDENCE INTRODUCED UPON DEFENDANTS' PLEAS TO THE JURISDICTION THAT THE BELLEVILLE AND SOUTHERN ILLINOIS RAILROAD COMPANY IS A RESIDENT OF THE EASTERN DISTRICT OF ILLINOIS.

In Section 14 of the Act of Congress approved March 3rd, 1905, 33 Stat. 992, creating the Eastern District of Illinois, it is provided "that the courts and judges of said Eastern District shall, within said District, respectively possess the same jurisdiction and powers, civil, criminal, equitable or otherwise, and perform the same duties as are now respectively possessed and performed by the Circuit and District Courts and Judges of the United States of the Southern District of Illinois."

Section 10 par. 2, of the same Act, defining the jurisdiction of the courts of the Southern District, provides:

> "That all civil suits not of a local nature, and criminal prosecutions, must be brought in the division of the said Southern District of Illinois where the defendant or defendants reside, or the offense is committed: but if there are two or more defendants in civil suits residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside."

In the case of Petri v. Creelman Lumber Company, 199 U. S. 487, this Honorable Court held that a clause similar to the last clause of Section 10, par. 2, cited above, gave the Northern District of Illinois jurisdiction where one of several defendants reside in the Northern District, and the other defendants reside in the Southern District. Section 10 of the Act of March 3rd, 1905, cited above, therefore, conferred jurisdiction on the Circuit Court of the Southern District, where one of several defendants is a resident thereof, and the other defendants are residents of the Northern Dis-

trict. And Section 14 of the same Act conferred the same jurisdiction on the Circuit Court of the Eastern District of Illinois.

Therefore, if the defendant, the Belleville and Southern Illinois Railroad Company, was a resident of the Eastern District of Illinois at the time complainant's bill was filed, the Court had jurisdiction of the other two defendants, the St. Louis, Alton and Terre Haute Railroad Company, and the Illinois Central Railroad Company, even if the two last named defendants were residents of the Northern District. To the evidence upon the question of the residence of the Belleville Company, the attention of the Court is now directed.

The only witness called upon the question of the residence of the Belleville Company was W. G. Bruen, Assistant Secretary, and his testimony is found on pages 63-71 of the Transcript of Record. There is no dispute as to the facts. The situation is as follows:

The Acts of Illinois of 1857 and 1869, creating the Belleville Company, made no provision for its residence. The Company was authorized to construct a railroad, every point of which was within the Eastern Judicial District, and the road actually constructed, viz., from Belleville, in St. Clair County, to Du Quoin, in Perry County, is wholly within said District. After the incorporation of the Belleville Company it is conceded that its residence and principal place of business were located at Belleville its western terminus, and there remained until October 23rd, 1896, some thirty years. About this time the Illinois Central Railroad Company secured the controlling interest in the stock of the Belleville Company, elected its own directors, filled the executive offices with its own officials and moved the stock transfer books, and the minute books of the directors and stockholders' meetings to Chicago, where they were stored away in the office of the Assistant Secretary of the Illinois

Central. On October 23rd, 1896, while the Belleville Company was still the owner of its railroad from Belleville to Du Quoin, the following resolution was passed at a stockholders' meeting:

> "By-law No. 1. The Annual meetings of the stockholders for the election of Directors and transaction of general business shall be held at the principal office of the Company in Chicago, on the third Wednesday of October each year. * * *"

During the year 1897 two formal meetings of the stockholders and two of directors were held in Chicago. Except these meetings and except the stock and minute books, mentioned above, the Belleville Company has never transacted any business, and never owned any property in Chicago. On these facts the defendants rely to establish the residence of the Belleville Company at Chicago, in the Northern District.

The first position taken by complainant is that it is legally *impossible* for a railroad company to locate its residence at a place, which is not upon its authorized line of road. The charter of a railroad company authorizes it to be a railroad company between two points, and not elsewhere. There are many incidental forms of business, such as employment of agents, etc., which could be performed anywhere, but the primary powers, the actual franchise of a railroad company can be exercised only between the points stated in its charter. In this sense, a railroad company is unlike a manufacturing, or ordinary business corporation, which can exercise its franchise anywhere, and become analogous to a municipal corporation. Investigation has not disclosed any case in which this question has been raised, nor has a case been discovered in which any other railroad company has attempted to locate its residence anywhere except upon its authorized route. In Galveston etc. Ry. Co. v. Gonzales, 151 U. S. 496, cited by counsel for the defendants in the

Circuit Court, it was merely held, when the railroad extends into two Federal Districts, the Company does not thereby become a resident of both districts, but of that district in which the Company chooses to locate its residence. In that case, the residence was located upon its legally defined route.

If this Honorable Court should hold that the residence of a railroad company is not confined to some point upon its authorized route, we respectfully predict a very general exodus of railroad companies from their present residences to the remotest and most inaccessible regions of their respective States.

In the second place, the complainant urges that there is no evidence of a change of residence on the part of the Belleville Company from Belleville to Chicago. At best, the evidence merely tends to show a change of its principal place of business, and the principal place of business is not a conclusive criterion of the residence of either a corporation or an individual.

Guinn v. Iowa Cent. Ry. Co., 14 *Fed. Rep.* 323 (*C. C. S. D. Iowa*, 1882:)

> "Love, D. J. The principle laid down in the case of McCabe v. Ill. Cent. R. R. Co., 13 Fed. Rep. 827, is decisive of the present case. The defendant is an Iowa corporation, having its principal place of business at Marshalltown, in the central division of the district of Iowa. Process was served upon its agent, C. M. Miller, at the town of Albia, in the southern division, returnable at Keokuk. The late Act of Congress, creating Circuit Court jurisdiction in the several divisions of the district of Iowa, provides, in substance, that suit shall be brought in the division in which the defendant has his residence. The defendant herein now moves to have the cause transfered to the central division on the ground that the residence of the defendant is at the principal place of business, which is in the central di-

vision. In addition to what is shown in the case of McCabe, supra, it may be said that the 'principal place of business' is no test of residence, whether of a corporation or natural person. A natural person might reside in one state and have his principal, or, for that matter, his sole place of business in another state. I presume that thousands of persons reside in Jersey City and have their principal place of business in New York, and many, no doubt, reside beyond the limits of the State of New York and carry on their *sole* business in the City of New York.

"The motion is denied."

The principles of the law of domicile require the concurrence of three elements to constitute a change of residence, *animus manendi, animus non revertendi,* and the actual location of a new domicil. As expressed by Mr. Jacobs in his work on the Law of Domicil, Sec. 125:

"All jurists agree that a change of domicil, of whatever grade, is a question of 'act' or 'fact,' and intention, and cannot be accomplished without the concurrence of both."

Assuming that the evidence discloses the requisite intention, the evidence does not disclose any unequivocal act on the part of the Belleville Company changing even its principal place of business. The by-laws of October 23rd, 1896 (Transcript p. 54), merely prodides that the annual meeting of stockholders "shall be held at the principal office of the Company in Chicago," which merely assumes the existence of such a place of business. But the evidence shows that on October 23rd, 1896, there was no principal place of business of the Belleville Company in Chicago. The effect of the by-laws was merely to direct that the stockholders' meetings should be held in Chicago, which would have been legal irrespective of the location of the principal place of business there. A change of the principal place of business

cannot be established by inference, in the face of the fact that the Belleville Company did not have, nor has it ever had, any business or assets in Chicago.

Furthermore, the Legislature of the State of Illinois has expressly provided the manner in which a corporation may change its principal place of business, and the Belleville Company did not comply, or attempt to comply with those provisions.

Chapter 32, Sec. 50, Revised Statutes of Illinois (Hurd, 1899), page 442, provides as follows:

"An Act to Provide for Changing of Names, for Changing the Places of Business, for Increasing or Decreasing the Capital Stock, for Increasing or Decreasing the Number of Directors, for Enlarging or Changing the Objects for which such Corporations were Founded, and for the Consolidation of the Incorporated Companies. Approved and in force March 26, 1873, as Amended by Act Approved June 6, 1889.

"Meeting of Stockholders, For.—Restriction. 1. That whenever the Board of Directors, managers or trustees of any corporation existing by virtue of any general or special law of this state, or any corporation, wherever organized, by virtue of any law of this State, may desire to change the name, to change the place of business, to enlarge or change the object for which such corporation is founded, to increase or decrease the capital stock, to increase or decrease the number of directors, managers or trustees, or to consolidate said corporation with any other corporation now existing or which may hereafter be organized, they may call a special meeting of the stockholders of such corporation, for the purpose of submitting to a vote of such stockholders the question of such change of name, change of place of business, enlargement or change of the object for which such corporation was formed, increase or decrease of the number of directors, managers or trustees, increase or decrease of the capital stock, or consolidation with some other corporation, as the case may

be; and further, that eleemosynary or religious corporations for educational purposes, acting under the general law or by virtue of a special charter, are authorized to change the time or manner of electing the trustees, and to allow the alumni of said corporation to vote in the election of the trustees, or part thereof. Provided, that in changing the name of any other corporation the provisions hereof, no name shall be assumed or adopted by any corporation similar to * * * * * * * * *; and provided further, that no corporation shall by virtue hereof, change its place of business from any town, county or municipality where such town, county or municipality, or any of the inhabitants thereof, or any person or persons interested therein, shall have donated or in any manner contributed any money or other valuable thing to induce such corporation to locate in such town, county or municipality. * * *.

"*Notice of Meeting.* Sec. 2. Such special meeting shall be called by delivering personally, or depositing in the post office, at least thirty days before the time fixed for such meeting, a notice properly addressed to each stockholder, signed by a majority of said directors, managers or trustees, stating the time, place and object of such meeting. A general notice of the time, place and object of such meeting shall also be published for three consecutive weeks in some newspaper printed in or nearest the county in which the principal business office of said corporation is located.

"Manner of Voting.—Two-Thirds necessary. 3. At any such meeting stockholders may vote in person or by proxy, each stockholder being entitled to one vote for each share of stock held by him; and votes representing two-thirds of all the stock of the corporation shall be necessary for the adoption of the proposed change of name, place of business, enlargement or change of the object for which such corporation was founded, number of directors, managers or trustees, amount of capital stock, or consolidation with some other company.

"Certificate of vote filed.—Changes Accomplished.—

General Law. 4. If at any regular annual meeting or at any time and place specified in said notice of the special meeting called for that purpose, said propositions or any of them be submitted to a vote, and if it shall appear that two-thirds of all the votes represented by the whole stock of such corporation are in favor of the propositions or of any of them so submitted, *a certificate thereof,* verified by the affidavit of the President and under seal of said corporation shall be filed in the office of the Secretary of State, and a like certificate filed for record in the office of the Recorder of Deeds of the county where the principal business office of such corporation is located. And upon the filing of said certificate the changes proposed and voted for at such meeting as to name, place of business, enlargement or change of the object for which such corporation was founded, increase or decrease of the capital stock, increase or decrease of the number of directors, managers or trustees, or consolidation with some other company, shall be and is hereby declared accomplished in accordance with said vote of the stockholders; and provided, further, that any corporation other than corporations for manufacturing purposes, availing itself of or accepting the benefits of or formed under this Act, except mere change of name, shall be subject to the general laws of this state now in force, or which may hereafter be passed, regulating corporations of like character.

"Notice of Change. 5. Such corporation shall upon the filing of said certificate, cause to be published in some newspaper in or nearest the county in which said principal office is located, a notice of such changes of corporation for three consecutive weeks.

"Consolidation of Railroad Companies.—Notice. 8. Whenever any railroad corporation desires to conconsolidate with any other railroad corporation, by virtue of the provisions of this Act, a notice as provided by Section 2 of this Act shall be given at least sixty days before the time fixed for such meeting, and the general notice as provided by said Section 2 shall be published for nine consecutive weeks; provided that

> any railroad corporation shall not consolidate their stock, property or franchise with any other railroad corporation owning a parallel or competing line."

For an Illinois corporation, therefore, to legally change its place of business, the following steps are required: a *special* meeting of the stockholders, for that purpose; a thirty day personal notice to each stockholder, signed by a majority of the directors, stating the time, place and *object* of the meeting; publication of such notice; a two-thirds vote for the proposed change; certificate of such change filed with the Secretary of State, and Recorder of Deeds of county where the principal business office is located; and a publication of such change. The Statutes provide that the change shall be accomplished *when* the certificate thereof is filed

The evidence does not show even an attempt on the part of the Belleville Company to comply with these provisions. The meeting of stockholders on October 23rd, 1896, was the regular annual meeting, not a *special* meeting (Transcript, p. 64); no notice to the stockholders is shown and no certificate filed. And more than this, as shown above, there was no resolution expressly changing the principal place of business.

At the hearing in the Circuit Court, counsel for defendants urged that the Belleville Company was created by a special Act, and therefore not subject to the general statutes. It would be a new principle of law, if a special charter freed a corporation from future regulation by general statute. Furthermore, Section 1 expressly includes corporations "existing by virtue of any general or special law of this State," and railroad corporations are not excluded. In fact, the latter are expressly mentioned in Section 8.

The propriety of regulations such as are contained in the aforesaid sections from the Statutes of Illinois, is not open to dispute. If the position of the defendants is correct, if

a railroad corporation can locate its residence anywhere within the state, and if the change of residence could be accomplished by expressing the stock transfer and minute books to the new destination, accompanied by the passing of a formal resolution, the effect upon those seeking to hold the corporation for its wrongs is not difficult to imagine. If the defendant should be desirous of avoiding any particular suit, it could change its residence from district to district as fast as the complainant could change courts.

We respectfully submit:

1. That the residence of a railroad company must be at some point upon its authorized route.

2. That the evidence does not show a change of residence on the part of the Belleville Company, from the Eastern District to the Northern District of Illinois, tested either by the general principles of the law of domicil, or by the express provisions of the Illinois Statutes.

IV.

THAT BY SECTION 14 AND 10 OF THE ACT OF CONGRESS APPROVED MARCH 3, 1905, CREATING THE EASTERN DISTRICT OF ILLINOIS, THE CIRCUIT COURT OF SAID DISTRICT WAS GIVEN JURISDICTION OF ALL CAUSES IN WHICH THE DEFENDANT IS FOUND WITHIN THE DISTRICT.

As stated previously, Section 14 of the Act of Congress approved March 3, 1905, 33 Stat. 992, creating the Eastern District of Illinois, conferred upon the courts of said District the same jurisdiction and powers as possessed by the courts of the Southern District of Illinois. Section 10. par. 2 of the same Act defines the jurisdiction and powers of the courts of the Southern District, and is in full as follows:

> "That all suits not of a local nature, and criminal prosecutions, must be brought in the division of the said Southern District of Illinois where the defendant or defendants reside, or the offense is committed; but if there are two or more defendants in civil suits residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside. When the defendant is a non-resident of the District, action may be brought in either division of said District wherein the defendant may be found."

By the express language used in the last clause of par. 2, Section 10, quoted above, the Circuit Courts of the Southern District are given sweeping jurisdiction in all cases where a non-resident defendant is *found* within the division in which the Court is sitting.

We quote the following language from the case of *Petri vs. Creelman Lumber Co.*, 199 *U. S.* 487:

> "But that Congress did not deem that a special provision as to a particular state or states was irreconcilable with the existence of the general rule, is conclusively shown by the fact that after the adoption of the

Act of 1875 various special acts were passed dividing particular states into two or more districts, or dividing a district or districts into divisions, and expressly declaring that in civil suits not of a local nature two or more citizens of the state might be joined as defendants, although residing in different districts of the state, and that siuit might be brought in either district. * * * * * *

"Indeed the legislation of Congress since the passage of the Act of 1887, under the hypothesis of the repeal of Section 740 of the Revised Statutes by that Act, also demonstrates that it was considered that the passage of a special statute as to a particular state, vesting jurisdiction in the courts within the state, where two or more defendants resided in different districts therein, was not irreconcilable with the existence of a general rule to the contrary in a statute having a general operation.

The language of the last clause of par. 2, Section 10, cited above, is broad enough to cover any case in which a non-resident defendant, even a resident of another State than Illinois, is *found* within the Eastern District of Illinois. The language of the Court in the opinion in the Petri case was directed to a clause similar to the previous clause of Section 2, in which Congress is manifestly dealing with the jurisdiction as between two districts within the same state. We respectfully submit, however, that it is within the power of Congress to pass a special act giving to a district in one state as broad a jurisdiction as was contained even in the original judiciary act, that is, in any case in which a defendant should be "found" within the District.

Another view of the last clause of par. 2, Section 10, would be that Congress was referring merely to a case in which a defendant residing in one district of Illinois should be "found" in another District. In this view the last clause of par. 2, Section 10, would be brought within the quotation cited above from the Petri case.

By the second clause of par. 2, Section 10, Congress covered a case in which there were two or more defendants residing in different districts, and provided that suit might be brought in either district in which one of the defendants resided. The procedure in such a case would be to serve process on the non-resident defendants at their place or places of residense in the other district. The interpretation of the last clause of Sec. 10, par. 2, which we have suggested above, is not inconsistent with the second clause. By the express words of the last clause Congress covered a case in which a resident of one district was found and served in another district. In such a case, unless the defendant were found within the district, he could not be brought within the second clause, there being no resident defendant.

In the present case all three defendants Railroad Companies, were found and served in the Eastern District of Illinois, and if the construction suggested above of the last clause of par. 2, Section 10, be correct, the Circuit Court of the Eastern District would have jurisdiction of this cause, irrespective of all other questions heretofore discussed.

It has occurred to counsel for complainant that by the last clause of par. 2, Section 10, Congress might have intended to refer to a case in which plaintiff was a resident of the district, and was merely covering the question of the venue of such a suit as between the different divisions of the district of the plaintiff's residence. The latter interpretation would coincide with the language of Section 3, of the Act of April 25, 1882 (22 Stat. p. 47), creating the Northern and Southern Judicial Districts of the State of Georgia, which is as follows:

> "But if there are two or more defendants, some residing in the northeastern division and others residing in any other portion of said Southern District of

Georgia, the action may be brought in any one of the divisions in which any one of the defendants reside. When the defendant is a non-resident of either division, action may, *if plaintiff is a citizen of the District*, be brought in that division wherein the defendant may be found."

Counsel for complainant do not feel certain as to the proper interpretation of the last clause of par. 2, Section 10, above cited, but in view of the decision in the Petri case, and in view of the express language of said clause providing that "when the defendant is a non-resident of the District, action may be brought in either division of said District wherein the defendant may be found," it is only proper to seek a decision by this Honorable Court on this point.

Appellant respectfully prays that the decree of the Circuit court of the Eastern District of Illinois, dismissing the appellant's bill for want of jurisdiction be reversed, at defendant's cost, and this cause remanded with instructions to said Circuit Court to take jurisdiction of appellant's bill.

Respectfully submitted,

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Counsel.